Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1975

No. 74-1628

APPLICATION OF BERNARD J. KORZEN AS COUNTY TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS, FOR JUDGMENT AND ORDER OF SALE AGAINST LANDS AND LOTS UPON WHICH THE TAXES REMAIN DUE AND UNPAID FOR THE YEARS 1971 AND 1972 AND FOR JUDGMENT FIXING THE CORRECT AMOUNT OF ANY TAX PAID UNDER PROTEST FOR THE YEARS 1971 AND 1972,

Appellee,

vs.

JOHN A. HUTTER,

Appellant.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS

MOTION TO DISMISS

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APPLICATION OF BERNARD J. KORZEN AS COUNTY TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS, FOR JUDGMENT AND ORDER OF SALE AGAINST LANDS AND LOTS UPON WHICH THE TAXES REMAIN DUE AND UNPAID FOR THE YEARS 1971 AND 1972 AND FOR JUDGMENT FIXING THE CORRECT AMOUNT OF ANY TAX PAID UNDER PROTEST FOR THE YEARS 1971 AND 1972,

Appellee,

VS.

JOHN A. HUTTER,

Appellant.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS

MOTION TO DISMISS

The appellee, Bernard J. Korzen, moves this Honorable Court to dismiss this appeal for all or any one of the following reasons:

1. This Court has no jurisdiction to hear the present case;

2. There is no substantial federal question presented to This Court.

ARGUMENT

I.

(a)

THIS COURT LACKS JURISDICTION IN THAT THE APPEAL IS NOT IN CONFORMITY TO FEDERAL STATUTE.

The appellant has failed to fulfill the threshold requirement of appealing a judgment entered by the highest state court in which a decision could be had. The Illinois Appellate Court was not the last state court in which the decision of the questions presented could be had within the meaning of 28 U.S.C. § 1257.

The test of finality is whether the appellate record indicates that the order of the reviewing court has in fact fully adjudicated the issues and that the adjudication is not subject to further review by a state court. A state appellate court's judgment is final when, after an application for review by the state's highest court, the review ends the litigation so that nothing remains to be done by the lower court except the ministerial act of entering the judgment on remittitur. *Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 268, 63 S.Ct. 233, 235, 87 L.Ed. 254, rehearing denied, 318 U.S. 802, 63 S.Ct. 890, 87 L.Ed. 1166 (1942). No decision of a state court should be brought for review either by appeal or certiorari until the possibilities afforded by state procedure for its review have been exhausted. *Gorman v. Washington University*, 316 U.S. 98, 100, 62 S.Ct. 962, 963. 86 L.Ed. 1300 (1942).

Here, the decision appealed from was entered on April 7, 1975, by the Illinois Appellate Court. *Korzen v.*

Hutter, 27 Ill. App.3d 634, 327 N.E.2d 138 (1975). Further state appellate procedure available to the appellant was not exhausted. The rules of procedure adequately enumerate the methods of further appeal. Ill. Rev. Stat. 1973, ch. 110A. Rules 315, 316, 317. Pursuant to Illinois Supreme Court Rules, the appellate mandate is stayed automatically when a party files a petition for review in the Illinois Supreme Court. Ill. Rev. Stat. 1973, ch. 110A, Rule 368(b). On July 8, 1975, without intervention by the Illinois Supreme Court, the mandate of the Illinois Appellate Court was transmitted to the Circuit Court of Cook County. (A certified copy is attached hereto as Exhibit A.). Hence, appellant has failed to file for review in the highest Illinois State Court.

The appellant, for the review of a state court decision, has failed to show affirmatively that This Court has jurisdiction. *Memphis National Order Co. v. Beeler*, 315 U.S. 649, 651, 62 S.Ct. 857, 859, 86 L.Ed. 1090, (1946). Therefore This Court is without jurisdiction and the application must be dismissed.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED TO THIS HONORABLE COURT ON APPEAL FROM THE ILLINOIS APPELLATE COURT.

(a)

Appellant Challenges The Constitutionality Of The Prepayment Under Protest Requirement Under The Illinois Revenue Act.

The appellant challenges on due process grounds the constitutionality of the payment under protest procedure required by the Illinois Revenue Act of 1939. Ill. Rev. Stat. 1971, ch. 120, §§ 675, 715. The appellant failed to pay real property taxes assessed against his property for

the years 1971 and 1972. The county collector applied for judgment and an order of sale of the property to satisfy the delinquent taxes. Objections were filed by the appellant. The objections were dismissed on the county collector's motion for failure to pay the taxes under protest.

The statute in question is Illinois Revised Statutes, Chapter 120, Section 675 (1971) which provides:

> "If any person desires to object pursuant to Section 235 of this Act to all or any part of real property tax for the year, for any reason other than that the real estate is not subject to taxation, *he shall first pay all of the tax installments due*, and such payment shall be accompanied by a writing, substantially in the following form:
>
> PAYMENT UNDER PROTEST . . ."
>
> (Emphasis supplied)

The principal question before This Court is whether there is a federal question involved such that This Court should take jurisdiction of the cause (assuming arguendo This Court may take jurisdiction). It is appellee's contention that there is no federal question here in that there is not a violation of the Due Process Clause of the Fourteenth Amendment.

There is a clear analogy between the local system here employed and that employed by the Federal Internal Revenue Service pursuant to the Internal Revenue Code. The United States District Courts and the United States Court of Claims are open to taxpayers wishing to challenge their federal income tax "assessments." The right to enter one of these courts is predicated upon the prepayment of the tax. Constitutional due process requirements hardly invalidate this system. As declared by Mr. Justice Brandeis in *Phillips v. Commissioner of*

Internal Revenue, 283 U.S. 589, 595-7, 51 S.Ct. 608, 75 L.Ed. 1289:

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a latter judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. (citations omitted) Property rights must yield provisionally to governmental need. . . .
>
> Where only property rights are involved, mere postponement of judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."

See: *Mitchell v. W. T. Grant*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed. 406 (1974).

There is a compelling state interest involved here to sustain and assure adequate revenue for the functioning of local government. State and local governments rely on revenue for their tax base.

Consistent with this is the absolute necessity that state governmental agencies be assured of a method of tax collection which assures that the revenue will be forthcoming at designated periods of time. The prepayment of taxes before an objection to the tax will be entertained accomplishes this goal. It also allows the local government to be assured of an adequate revenue source. More importantly, it allows state taxing agencies to know in advance the number of challenges, or objections, which will be made to the imposition of such tax. The local government is, consequently, more able to plan its future expenditures in a more effective and efficient manner, benefiting the community as a whole.

The taxpayer has two remedies available to him. The first is to challenge the assessment initially. If this is done the taxpayer is entitled to and is given a hearing at that time. Ill. Rev. Stat. 1971, ch. 120, § 593 et. seq. This hearing is before an administrative board, where the taxpayer can challenge the amount of the assessment. Assuming at this point that the taxpayer fails to avail himself of his right to a hearing or he is not satisfied with the results of the hearing he pays under protest the assessed tax when it later comes due and initiates his day in court. It is submitted that the employment of the hearing procedure followed by a requirement of prepayment closely parallels the federal system and that all requirements under due process are thus maintained.

This Court has on numerous occasions had the opportunity to examine the issue of prepayment of monies as a condition precedent to some action. In *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S.Ct. 1221 (1949) this Court upheld a New Jersey statute requiring the posting of security to cover the reasonable expenses of the litigation in shareholder derivative suits as against a due process challenge. The opinion stated: ". . . it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met." *Supra* at p. 1228. And in an earlier case, *Jones v. Union Guano Co.*, 264 U.S. 171, 44 S.Ct. 280 (1924) was decided, stating:

> "The Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of the distinction is real, and the condition imposed has a reasonable relation to a legitimate object." *Supra* 264 U.S. at 181.

It is submitted that there is no more "legitimate object" than securing the revenue base of a local governmental unit. This money is a tax which is due and owing. In the event the tax is improper for one reason or another, that part or all of it which is improperly levied is returned to the taxpayer. No portion of the money is retained to provide for the expenses of the litigation or the various administrative costs involved. Compare: *Schilb v. Kuebel*, 404 U.S. 357, 30 L.Ed.2d 502, 92 S.Ct. 479 (1971).

No substantial question of constitutionality is raised in the present case. A compelling state interest is being served by the condition precedent here imposed. This Court has long recognized that the state legislatures have the power to place such conditions upon access to the state courts when a compelling state interest is involved and the condition is a reasonable one. Here both the condition and the purpose are reasonable. The appellant here is in no different position than thousands of other real property owners in Cook County, Illinois or throughout this state and many other states having similar statutes.

(b)

The Classification Of Real Property For Purposes Of Taxation Is Constitutionally Permissible.

The appellant challenges the tax scheme of Cook County, Illinois, authorized by Article IX, Section 4(b) of

the Illinois Constitution.[1] The provision provides that certain counties (based on population) may classify real property and tax or assess the highest class of property two and one-half times the lowest class of property within the county.

The ground rules applicable to a challenge to a revenue classification on constitutional grounds have long been established.

> "The test is whether the difference in treatment is an invidious discrimination. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled the States have large leeway in making classifications and drawing lines which, in their judgment produce reasonable systems of taxation (citations omitted)."

Lake Shore Auto Parts Co. v. Lehnhausen, 410 U.S. 356, 359 (1973).

This Court has recently declared:

> ". . . we stand on familiar grounds when we continue to acknowledge that the Justices of this court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. . . . No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex area, in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny, lest all local fiscal schemes become subjects of criticism under the equal protection clause." *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 40-42 (1973).

[1] Section 4. REAL PROPERTY TAXATION

(a) Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

(b) Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or to continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential real property in that county.

(c) Any depreciation in the value of real estate occasioned by a public easement may be deducted in assessing such property.

As noted in the memorandum opinion of the Appellate Court, the Illinois Supreme Court has considered the validity of the classification provisions authorized by the Illinois Constitution. *People ex rel. Kutner v. Cullerton*, 58 Ill.2d 266, 272, 274, 319 N.E.2d 55 (1974). Total reliance was placed on constitutional standards enumerated by this court. Thus, no substantial federal question is presented for review of this cause.

CONCLUSION

BERNARD J. KORZEN, County Treasurer and Ex-Officio County Collector of Cook County, Illinois, requests This Court to dismiss this appeal.

Respectfully submitted,

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APPENDIX

Exhibit A

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Present The Honorable Mayer Goldberg Presiding Judge

Present The Honorable Edward J. Egan Judge.

Present The Honorable Seymour F. Simon Judge.

Leslie V. Beck
Clerk.

Richard J. Elrod
Sheriff.

In the Matter of the Application of
Bernard J. Korzen, as County Treasurer and
Ex-Officio County Collector of Cook County
for Judgment and Order of Sale Against Lands
and Lots Upon Which the General Taxes Remain
Due and Unpaid for the Year 1972, and for
Judgment Fixing the Correct Amount of any
Tax Paid Under Protest for the Year 1972.
No. 60384 vs. Appellees

John A. Hutter and Clare Hutter,

Appellants

Appeal from the Circuit Court
of Cook County
(No.)
General No. 73-27

Objection No. 722

AFFIRMING ORDER

The order appealed from of the Circuit Court of Cook County is AFFIRMED xxxd

xxxx